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No. 80-885

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, *Respondent.*

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

MALLEABLE IRON RANGE COMPANY *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF ON BEHALF OF OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC, AS AMICUS CURIAE

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STATEMENT OF INTEREST

The Office and Professional Employees International Union, AFL-CIO, CLC, is an international labor organization representing white collar and other employees engaged in office, clerical, professional, semi-professional, technical, and administrative work. Collec-

tive bargaining agreements covering the wages, hours, and working conditions of these employees are negotiated and consummated in most, but not all, situations by local unions chartered by the International Union. OPEIU Local 39 was the petitioner before the National Labor Relations Board in the original representation proceeding that launched the controversy in *Malleable Iron Range Company* and the charging party in Case No. 30-CA-5206 which was later reviewed by the Court of Appeals.

The International Union, believing itself to be the major labor organization in the United States in engaged in representing office and professional employees, is virtually concerned with the single issue in this case, since a vast majority of its members, in their daily employment, have access to information that most employers would not want revealed to competitors, to regulatory agencies, and to the public in general. An affirmation of the ruling below would result in the virtual destruction of the International Union as a meaningful entity in the representation of such employees.

There is likewise a broad concern for the entire American work force engaged in office, clerical, professional, and semi-professional work. The Bureau of Labor Statistics has projected that, by 1990, the economy will have created nearly 20 million new jobs, well over half of which will be in white-collar occupations. In the white-collar category, clerical employees, which include bank tellers, bookkeepers, cashiers, secretaries, and typists, are the fastest growing group. U.S. Department of Labor Statistics, News Bulletin 79 - 903 (Dec. 27, 1979). They will join millions of other similar employees who are not presently represented for the purposes of collective bargaining. Since most of their

work would, in one form or another, allow them access to information that an employer would consider confidential, they would be removed from coverage of the National Labor Relations Act.

Consent in writing to the filing of this brief amicus curiae has been obtained from the other parties involved, and such written consents are being filed with this brief in the Clerk's office.

The Office and Professional Employees International Union, as amicus curiae, supports the position of the National Labor Relations Board in this Court, and urges that the rulings below be reversed.

Statements of facts are omitted, since they will be contained in the Board's brief.

ARGUMENT

I. Historic Congressional And Judicial Considerations Have Been At All Times To Keep Management Personnel And Non-Management Employees Separate For Collective Bargaining Purposes

When one begins at the very essentials of the collective bargaining process, the initial inquiry, of necessity, must be who is to be bargained for. As is well known, Congress, in passing the Wagner Act, defined the term "employee" broadly, with but a few specified exceptions such as agricultural laborers, those in domestic service, and individuals employed by parent or spouse. 49 Stat. 449, Sec. 2 (3).

The task of determining who would be covered or included within bargaining units was reposed in, and carried out by, the Board. These observations preface the Board's decisional process, where its early rulings

recognized but one particular area for the exclusion of employees who were alleged to be "confidential." In *Brooklyn Daily Eagle,* 13 NLRB 974 (1939), it excluded personal secretaries to managers who handled union negotiations and grievances. In *Hoover Co.,* 55 NLRB 1321, at 1323 (1944), it set forth a rationale that has been at the core of its "confidentiale" policy from that time to this day:

> . . . management should not be required to handle labor relations matters through employees who are represented by the union with which the [employer] is required to deal and who in the normal performance of their duties may obtain advance information of the [employer's] position with regard to contract negotiations, the disposition of grievances, or other labor relations matters.

There was never any other, insofar as alleged confidential employees were concerned. There was no case law, or even decisional reference, as far as we know, that would lead any student of labor-management relations to think otherwise.

The touchstone of Wagner Act coverage, just as under the 1947 amendments that produced the current Act, has been in its definitions. In defining the term, "employer," the Wagner Act Congress made certain exclusions, which implied coverage to all not excluded, and likewise with its term, "employee," it was not seriously disputed that all who were not specifically excluded were to be embraced within the statute's protections.

It was never considered that those persons in the normal performance of their duties who may obtain advance information of the employer's position with regard to contract negotiations, and related labor matters, were not employees. The only issue before the Board in the

earlier cases, such as *Brooklyn Daily Eagle* and *Hoover Co., supra,* was whether they should be included in the same bargaining unit with other employees. The Board, for the reasons stated, concluded that they should not, leaving aside any question of what unit or units they might be allowed to participate in, or even whether they would be entitled to some unit of their own.

The foregoing discussion may appear to be elementary, but it seems a necessary perspective from which to approach the important area of legislative history so frequently relied upon in cases of the kind before us.

As this Court has repeatedly documented, the primary public, judicial, and Congressional dispute over the status of employees prior to the 1947 amendments concerned foremen. This Court's discussion in *NLRB* v. *Bell Aerospace Company,* 416 U.S. 267 (1974), the holding that spawned the decision below in these cases, adequately illuminates this controversy. After shifting its ground on the status of both foremen and managerial personnel, the Board ruled that foremen as statutory "employees" could constitute an appropriate unit for bargaining with their employers in *Packard Motor Co.,* 61 NLRB 4, 64 NLRB 1212 (1945). This holding led to this Court's decision affirming the Board in *Packard Co.* v. *Labor Board,* 330 U.S. 485 (1947), where the famed dissent of Mr. Justice Douglas became an articulate catalyst in the 1947 amending process.

These histories are too well-known to bear extensive and detailed repetition. The ultimate, undisputed point is that Congress in 1947 specifically amended the definition of "employee" to exclude those who were classed as supervisors. The only addition to the exclusionary language was that of "independent contractor," along with individuals employed by employers under the

Railway Labor Act, who were undoubtedly previously excluded under the Wagner Act because of the employer definition that exempted Railway Labor Act employers. Because independent contractors are primarily self-employed, it is safe to say that the *only* specific statutory exclusion from among employees was the supervisor.

As this Court so readily recognized in *Bell Aerospace,* this limited exclusion did not settle all controversies over the initial inquiry that began with the passage of the Wagner Act, i.e., who was to be bargained for. But focusing on the clash of competing ideas in the supervisor controversy should afford great guidance as to what Congress intended when it undertook its major overhaul of the Act in 1947. This Court's opinion in *Bell Aerospace* well captured the essence of the conflicting viewpoints, particularly as it emphasized the importance of Mr. Justice Douglas' dissent in the *Packard* case.

The real struggle was over who should be on the side of management and who should be on the side of labor. This is hardly ideological or philosophical, but rather intensely practical. While both judicial and Congressional analyses spoke in philosophical terms, the end result was, as always, addressed as to what persons should be sitting on which side of the table. Mr. Justice Douglas even used the term, "separate factions in warring camps," to illustrate his point that vice-presidents of companies, who were also employees, ought not be organized into unions.

Indisputably, these are judgments for Congress to make. A judgment was made in 1947, and this Court, as we study its decisions over the years, has faithfully endeavored to determine what Congress meant and apply it, as it did in *Bell Aerospace*. In that case, there was but

a single question before this Court, and no other. It was "whether all 'managerial employees,' rather than just those in positions susceptible to conflicts of interest in labor relations, are excluded from the protections of the Act." 416 U.S. at 274.

The problem confronting this Court in *Bell Aerospace* in dealing with managerials who might not fit the statutory definition of supervisor was to determine the intent of Congress as to whether these kinds of persons who were also "employees" of their employer should be excluded from statutory coverage. If they were also supervisors, of course, no problem would exist, since supervisors were excluded by definition from statutory coverage.

While it should be self-evident, whether there is statutory coverage or not is a far different issue than whether a particular employee should be in a particular bargaining unit, as was the question before the Labor Board in its earlier "confidential" cases, such as *Brooklyn Daily Eagle* and *Hoover Co.*

This Court's holding in *Bell Aerospace,* as we all know, was that managerials were not entitled to statutory coverage at all. Later, in *NLRB* v. *Yeshiva University,* _____ U.S. _____ (1980), at it termed its *Bell* ruling as "the *judicially implied exclusion* for 'managerial employees' *who are involved in developing and enforcing employer policy.*" (Emphasis supplied).

This explanation in *Yeshiva University,* we believe, is extremely important in illuminating the central core issue in the instant cases.

It may appear presumptious indeed to attempt to tell this Court what its holding was in so recent a case as *Bell Aerospace,* and we seek to forgo even the ap-

pearance of doing so. But an argument in our cases here can hardly be made without constant reference to *Bell,* since the Court of Appeals below relied on it, and nothing else.

Therefore, it would appear that the "judicially implied exclusion" of managerials from statutory coverage, as we seek to understand *Bell Aerospace,* would come from their status as "being in the nature of supervisors," or as "those whose interests are as closely aligned with those of management as those of supervisors, who must direct the work force." As this Court further explained in *Yeshiva University, supra,* managerial employees are defined as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer. . . . These employees are 'much higher in the managerial structure' than those explicitly mentioned by Congress, which 'regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary.' " _____ U.S. _____, at _____.

This brings us to the status of "confidential" employees and what we believe was a major misperception of the court below in interpreting this Court's holding on managerials.

The secretary who was fired in such "lamentable injustice", as Judge Cudahy termed it below, in *Hendricks County Rural Electric Membership Corporation* is unquestionably an employee under anyone's statutory definition. The 18 office clericals sought to be excluded as confidential by *Malleable Iron Range Company* are employees as well, since no one would contend they are supervisory and neither could it be argued that they are managerials "who formulate and effectuate management

policies by expressing and making operative the decisions of their employer."

The proposition which respondents will be compelled to argue, it would appear, to support the Seventh Circuit's decision is that the intent of Congress, as interpreted by this Court in *Bell Aerospace,* was to enroll these employees on the side of management as against the interests of other employees to such a degree that they would take on the similar *status* of supervisors, and thus be termed "non-employees" as are managerials.

Such a proposition simply cannot be sustained.

The Seventh Circuit relied almost entirely on this Court's footnote 12 in *Bell Aerospace* in its *Hendricks County* decision. And, after having concluded that *all* (emphasis by court below, 31a) secretaries working in a confidential capacity must be *excluded* (emphasis supplied) from the Act, it was the next logical step in *Malleable* to conclude that all other employees, no matter what job they may hold, as long as they have access to information the employer considers confidential, must likewise be totally excluded from coverage of the Act, presumably as "non-employees." (We would suspect that nearly all of the 55 employees who voted in the election would have some access to information considered by Malleable to be confidential, rather than the 18 identified. We further suspect that Malleable proceeded with some degree of timidity in this area, surely not recognizing the full consequences of the scope of what it was seeking to accomplish.)

Prior to the 1947 amendments, there was never any public or judicial controversy, as far as we can learn, about whether employees who had access to information considered confidential by their employers were on the

side of management or on the side of labor, in contrast to the spirited controversy over the status of supervisors.

This Court's discussion of the 1947 legislative history that preceded note 12 (which we shall not attempt to repeat here, since we expect the history to be more fully developed in the Board's argument), noted that the original House version of the bill wanted to make exclusions of certain persons defined as supervisors explicit. In that original bill, there was specific language that may well have accomplished what the court below accomplished in its ruling: it would have excluded individuals who are given "by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally."

Such explicit language, however, was never enacted into law, having been removed in conference. This Court, in discussing the unfolding history, in the sentences that produced note 12, said:

> The legislative history strongly suggests that there also were other employees, much higher in the managerial structure, who were likewise regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary. For example, in its discussion of confidential employees, the House Report noted that "[M]ost of the people who would qualify as 'confidential employees' are *executives and are excluded from the Act in any event.*" [Italics by this Court.] H. R. Rep. No. 245, at 23.

In note 12, this Court repeated the "Most of the people" quotation from the House Report, once again italicizing the language. It added further words from the House Report that indicated the House belief that the Board itself "normally excludes from bargaining units

confidential clerks and secretaries to people such as these."

The "such as these" were surely the executives referred to previously. At this point, we must note that the House was talking in terms of *exclusion from statutory coverage* of those executives considered confidential while it mentioned only that the Board "normally excludes" from bargaining units clerks and secretaries to people "such as these." Again, there is the difference between statutory coverage and inclusion or exclusion from bargaining units, two very separate and distinct matters.

This Court, in continuing its commentary in note 12, pointed out that the discussion concerning "confidentials" went farther than those involved in labor relations. This brings us once again to "executives," whom the House thought would be excluded from the Act in any event. This Court then said, "Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover 'confidential employees' even under a broad definition of that term."

But whatever Congress may have thought, any reference to exclusion of confidentials was still focused on "executives," since they were the ones considered by Congress to be given information that was of a confidential nature. This follows from their role in "running the business," or in "formulating and effectuating management policies by expressing and making operative the decisions of their employers." To perform these functions, it would be almost impossible to deny them access to information that would not be available to the public, to competitors, and to employees generally.

This, of course, is consonant with the House's statement that the Board normally excluded from bargaining units confidential clerks and secretaries to "people such as these."

Thus, the legislative history, while showing the intent to exclude managerials that this Court found in *Bell Aerospace,* does not show, even in any strained interpretation, that Congress ever considered that secretaries and clerks were "non-employees." It knew they were excluded from bargaining units by the Board in some instances, but, as we have pointed out, this is a far different matter than statutory exclusion as such.

The consequences of exclusion of a vast army of America's work force from statutory coverage would have been nearly incomprehensible. Judge Cudahy, in his dissent below, perceptively pointed out that, "Many, *if not most,* (emphasis by Judge Cudahy) white collar workers are involved in something which may be argued to be 'confidential' in some general sense. There are matters of credit, of costs, of designs, of customer lists, of prices, of medical records — the list is endless. I do not perceive at all that the dicta of Bell Aerospace points down this road."

It would be difficult indeed to argue rationally that Congress knowingly and deliberately, in these words in its reports on a subject matter that is still embedded with legal complexities, intended to remove from statutory coverage every clerical worker in America who had access to information his employer considered confidential. Any fair reading of its reports, it seems, points indisputably to the conclusion that the "access" persons it was concerned about were executives, not rank and file office workers.

This returns us full circle to the Congressional rationale for the placement of supervisors and "managerials" beyond the statutory protection of the Act. One does not need to indulge in class terminology of "warring camps" to recognize that the interests of those who manage the business and those who labor in it are vastly different. Congress showed its displeasure with the concept of unionization of foremen by defining supervisors and making them "non-employees." This Court has found a "judicially implied exclusion" from the statute's coverage for those who formulate and effectuate management's policies, for they, too, are even more involved in managing the enterprise than the front line supervisor on the shop floor or in the office.

Contrariwise, secretaries and clerks and draftsmen and salesmen who may have access to innumerable portions of information their employers would not want to be made public are not engaged in directing work forces or managing the enterprise. They ordinarily have not committed themselves to pursue careers in managerial hierarchies, unless they are promoted to that level. There is simply no reason to hold that they are not statutory employees under the Act.

This is why the Board's "labor nexus" test has proved such a sound, workable solution to the issue of whether certain clericals should be included within collective bargaining units. It has excluded those who have access to confidential information in the labor relations area, not because they are not employees, which they are, but because their participation in collective bargaining would interfere with the Congressional effort to keep those who are aligned with management and those who are not as separate entities in the collective bargaining process. The rationale of *Hoover Co.* has stood the test

of some 37 years of experience with it thereafter. It was never judicially questioned in any serious manner until the surprising rulings of the court below.

Most assuredly, the Seventh Circuit's clinging reliance on note 12 in *Bell Aerospace* did not take into account the consequences of what its decision might bring, despite the stern warning in the dissent of Judge Cudahy. To consider true confidentiality of information and records, one need only look to the health care industry. Medical patients repose in confidence that their records will not be made known to the public and to unauthorized persons of every walk of life. Yet, Congress amended the Labor Act in 1974 to extend statutory coverage to employees throughout the health care industry, with special provisions pertaining thereto.

It cannot be disputed that records clerks and secretaries and technicians by the scores have access to confidential medical records of patients in health care institutions as a regular part of their daily duties. Yet, the implications of the decisions below would be to deprive a vast number of employees of health care institutions of statutory protection because they have access to records of confidentiality only a few short years after the Congress, surely aware of the confidential nature of their work, amended the statute to extend coverage to them. Such a paradoxical result was never intended.

Similar difficulties would surely arise with professional employees. Congress carefully defined the term, "professional employee," in §2(12) of the Act and provided protection for their interests from being included in bargaining units with non-professionals against their wishes. As a practical matter, it would be difficult to conceive that a research chemist in a laboratory, or a design engineer, or even a staff lawyer would not have

access to data that an employer would not want made known to the public or to competitors or to any unauthorized person. It may be said to be endemic in the nature of their work, for professional performance is surely of a level that involves judgments dealing with front rank company information of a vital kind. Yet, to exclude as a non-employee any individual having access to data that an employer would not want made generally known would surely eliminate most professional employees from statutory coverage, even though Congress specifically included them within the law.

The true concern of Congress was with division of interests. The entire scope and breadth of Congressional history and statutory enactment was to place on the side of management all those whose interests were truly aligned with management, and to authorize collective bargaining for all those whose interests were not truly aligned with management. The secretary or office clerk, because they perchance through their regular daily work had access to confidential business information, were never considered to be among those whose interests were truly aligned with managerial personnel. They are within the statutory definition of "employee," pure and simple, and there is no warrant whatever for interpreting the statute otherwise.

II. Breaches Of Confidentiality, If Any, By Employees Can Be Remedied Through Discipline, Not Deprivation Of Statutory Rights

While the foregoing discussion, if correct, which we believe it to be, is sufficient to resolve the question of whether employees who may have access to confidential business data are covered within the statutory definition of "employee," it is submitted that even the controversy

itself, and the frequent raising of it by employers is literally much ado about nothing.

Any employee who may breach his employer's rules against divulging of confidential business data may be properly disciplined. This is irrespective of membership in a lab or organization, which is a subject matter separate and apart from handling of data of confidentiality. An employer might argue that it would be more difficult to impose discipline under a union contract, but that, of course, presupposes that due process under a "just cause" provision in a labor agreement is a bad thing. Surely, any knowledgeable and sophisticated employer well knows that proof of wrong doing, such as violation of a rule against disclosure of business data, will sustain disciplinary action properly imposed, no matter what any union contract of which we are aware would hold. The desire to protect business secrets is totally unrelated to collective bargaining, a monstrous *non sequitur*.

The Board, of course, has dealt adequately with this issue in its decisions over the years. It has surfaced repeatedly, but never with more acuity than in two *Dun & Bradstreet* cases. Dun & Bradstreet, whose well known credit reporting is subject to its own strict rules of confidentiality has argued repeatedly for the denial of collective bargaining for its employees who gather financial data. In *Dun & Bradstreet, Inc.*, 194 NLRB 9 (1971), the Board stated: "The law has clearly rejected the notion that membership in a labor organization is in itself incompatible with the obligations of fidelity owed to an employer by its employees."

In *Dun & Bradstreet, Inc.*, 240 NLRB No. 16 (1979), the employer sought reconsideration of the Board's ruling, and offered evidence even that unioniza-

tion would have an adverse impact upon its business because of customer reluctance to provide data to unionized credit reporters. While one may personally reject such speculative fear as another ludicrous example of political-type hyperbole, the Board found no real evidence to that effect, even though it was deemed irrelevant to statutory protection. But the Board, willing to assume, *ad arguendo,* that there might be unwarranted disclosure, aptly remarked in its note 7 that ". . . there is no reason to suppose that the Employer would be any less able to remedy employee breaches of confidentiality by disciplining offending employees merely because its employees were represented by a union."

Thus, the only policy rationale for excluding non-supervisors and non-managerials from bargaining units is that adopted by the Board, access to labor relations data. One might inquire whether breaches of confidentiality here could be adequately remedied by discipline also, but the unit determination has long ago been made by the Board, and no one today even disputes it as sound doctrine.

CONCLUSION

In dealing with the status of secretaries and clerks and white collar personnel who may have access to information an employer might consider confidential in a business sense, it must be recognized that these employees fall within the statutory definition of "employees," and are thus protected by the Act. To argue that Congress intended that they not be statutory employees is to stand upon virtually nothing, since there is no probative history of an affirmative Congressional intent to that effect. For all these reasons, the rulings of the court below should be reversed and the position of the Board upheld in all respects.

Respectfully submitted

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